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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 138

JAMES J. RAFFERTY, As Collector of Internal Revenue For the Philippine Islands, *Petitioner*,

v.

SMITH, BELL & COMPANY, LIMITED, *Respondent*.

No. 140

JAMES J. RAFFERTY, As Collector of Internal Revenue For the Philippine Islands, *Petitioner*,

v.

COMPANIA GENERAL DE TABACOS DE FILIPINAS, *Respondent*.

No. 142

JAMES J. RAFFERTY, As Collector of Internal Revenue For the Philippine Islands, *Petitioner*,

v.

VISAYAN REFINING COMPANY, *Respondent*.

BRIEF FOR PETITIONER ON THE MERITS

PRELIMINARY OBSERVATION

As these actions were commenced and prosecuted against the Collector of Internal Revenue for the Philippine Islands and not against the person who held or who is now holding that position in his individual or private capacity, it is agreed by counsel for all the parties that the

substitution of the name of the present Collector of Internal Revenue for that of James J. Rafferty may be considered as having been duly made.

STATEMENT OF THE CASES

The three above entitled cases are here on writs of certiorari issued to the Supreme Court of the Philippine Islands for the review of the judgments of that court holding illegal the collection of certain taxes and ordering the Collector of Internal Revenue, defendant below, to refund the same to the respective respondents, plaintiffs below. Although the three cases are submitted on one brief because all the questions in each case are essentially the same, a short statement of the facts will be made in each case.

Rafferty, Petitioner, v. *Smith, Bell & Company, Limited, No. 138.*

During the periods from October 1, 1916, to September 30, 1917, and from October 1, 1917, to December 31, 1917, Smith, Bell & Company, plaintiff below, sold and consigned to various persons and firms without the Philippine Islands merchandise, the produce of the Philippine Islands, of the value of P30,671,643.00 and P10,646,362.00, respectively, on which were levied and collected, over the protest of the company, under the provisions of Section 1614 of Act No. 2657 and Section 1459 of Act No. 2711, a tax of 1 per cent which amounted to P306,716.43 and P106,463.43 (R. 1-6). As a result of an action to recover, a judgment was entered in favor of the company and against the Collector of Internal Revenue for the refund of P306,716.43, without either interest or costs (R. 9). On appeal the Insular Supreme Court affirmed, on January 26, 1920, that judgment, with interest at the rate of 6 per cent on the separate amounts

from the dates of payment, "and costs as above indicated" (R. 12-17). When the judgment was entered on March 15, 1920, the words "and costs as above indicated" were omitted (R. 24).

Rafferty, Petitioner, v. *Compania General De Tabacos De Filipinas, No. 140.*

During the periods from January 1, 1916, to June 30, 1916, and from October 1, 1916, to December 31, 1916, the Compania General De Tabacos De Filipinas, plaintiff below, consigned to its agents abroad merchandise, the growth and produce of the Philippine Islands, of the value of P434,557.77 and P1,736,554.00, on which the Collector of Internal Revenue levied and collected, over the protest of the company, under the provisions of Acts 2541 and 2622, and Section 1614 of Act No. 2657, a tax of 1 per cent which amounted to P11,189.59 and P17,365.54 (R. 1-7). As a result of an action to recover, judgment was entered in favor of the company and against the Collector of Internal Revenue for the refund of P21,261.84, without either interests or costs (R. 9). On appeal the Insular Supreme Court modified, on February 18, 1920, the judgment of the trial court and entered, on March 16, 1920, a judgment in favor of the company for the sum of P17,365.54, with interest (R. 16).

Rafferty, Petitioner, v. *Visayan Refining Company, No. 142.*

During the months of November and December, 1916, the Visayan Refining Company, plaintiff below, shipped as owner 2,268,704 tons of cocoanut oil, worth P1,186,171.-00, to its agents in New York. The Collector of Internal Revenue levied and collected, over the protest of the company, under the provisions of Section 1614 of Act No. 2657, a tax of 1 per cent which amounted to P11,861.71 (R. 1-4). As a result of an action to recover, judgment

was entered in favor of the company and against the Collector of Internal Revenue for the refund of the amount thus collected, without either interest or costs (R. 7). On appeal the Insular Supreme Court affirmed on February 21, 1920, that judgment, with interest (R. 11). Final judgment was entered on March 18, 1920 (R. 13).

Assignment of Errors Applicable to the Three Cases.

The Insular Supreme Court erred:

1. In holding that the taxes levied and collected under the provisions of Section 1614 of Act No. 2657, known as the Administrative Code of 1916, on the merchandise sold and consigned by the respondents to the various persons and firms without the Philippine Islands, were duties or taxes on exports;
2. In failing to hold that the collection of said taxes had been duly legalized and ratified by the Act of Congress of June 4, 1918 (40 Stat. 597);
3. In holding that Act No. 2711 (Sec. 1459) repealed Section 1614 of Act No. 2657; and
4. In entering judgments against the Collector of Internal Revenue and in favor of the respondents, plaintiffs below, for the refund of the taxes in question, together with interest on the respective amounts.

We shall also urge that the collection of the taxes involved in these cases was duly legalized and ratified by the Act of Congress of June 5, 1920 (41 Stat. 1025).

ARGUMENT.

PART I.

The Insular Supreme Court erred in deciding that the taxes levied and collected under the provisions of Section 1614 of Act No. 2657, known as the Administrative Code, on the merchandise sold and consigned by the respondents

to various persons and firms without the Philippine Islands were duties or taxes on exports.

Origin and history of the law governing the percentage tax on merchants' sales.

By Sections 36 and 142 of Act No. 1189, the first real Internal Revenue Law enacted by authority of the United States in the Philippine Islands, and effective August 1, 1904, it was provided (Section 36) that no tax imposed on liquors, matches, cigars and cigarettes shall be collected on any portion of such articles as shall be actually exported; and that (Section 142) exporters, on the raw material and manufactured or partially manufactured products actually exported by them, shall be exempted from the payment of the taxes imposed in section one hundred and thirty-nine. This last mentioned section reads in part as follows:

> "Sec. 139. Except as hereinafter specifically exempted, there shall be paid by each merchant and manufacturer a tax at the rate of one third of one per centum on the gross value in money of all goods, wares, and merchandise sold, bartered, or exchanged for domestic consumption in the Philippine Islands, and this tax shall be paid whether such commodities consist of raw materials or manufactured or partially manufactured products, and whether of domestic production or imported."

By Act No. 2339, entitled "An Act revising and consolidating the laws relative to internal revenue" effective July 1, 1914, it was provided:

> "Sec. 40. Percentage tax on merchants' sales.—All merchants not herein specifically exempted shall pay a tax of one-third of one per cent on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, or exchanged by them, such tax to be based on the actual selling price

or value at which the things in question are disposed of whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin.

"Sec. 41. Sales not subject to merchants tax.—In computing the tax above imposed transactions in the following commodities shall be excluded:

(a) Merchandise actually exported by the vendor;

* * * * * *

"Sec. 55. Articles subject to specific tax.—Specific internal revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported from the United States or foreign countries, but not to any thing produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state or as an ingredient or part of any manufactured article or product.

* * * * * *."

Section 5 of Act No. 2432 (Public Laws of the Philippine Islands, vol. 10, p. 151), December 23, 1914, amended Section 40 of Act No. 2339 by increasing the rate from one-third of one per cent to one per cent. Section 3 of Act No. 2541 (Public Laws of the Philippine Islands, vol. II, p. 125), effective by its terms from January 1, 1916, to December 31, 1917, amended Section 41 of Act No. 2339 by eliminating the phrase "(a) Merchandise actually exported by the vendor." Section 3 of Act No. 2622 (Public Laws of the Philippine Islands, vol. II, p. 278), effective as of January 1, 1916, amended the first paragraph of Section 40 of Act No. 2339, *supra*, by inserting the word "CONSIGNED" just after the word "bartered" therein. The first paragraphs of Sections 1614 and 1633 of Act No. 2657, known as the "Adminis-

trative Code of 1916," effective July 1, 1916, read as follows:

"Sec. 1614. Percentage tax on merchants' sales. —All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based on the actual selling price or value at which the things in question are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold."

"Sec. 1633. Articles subject to specific tax.— Specific internal revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported from the United States or foreign countries, but not to any thing produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state or as an ingredient or part of any manufactured article or product."

Act No. 2711, effective by its terms October 1, 1917, amended certain sections of the Administrative Code of 1916, Act No. 2657, and changed the section numbers. The first paragraphs of Sections 1459 (old code, Section 1614) and 1478 (old code, Section 1633) read as follows:

"Sec. 1459. Percentage tax on merchants' sales. —All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based on the actual selling price or value of the things in question at the

time they are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold."

"Sec. 1478. Articles subject to specific tax.—Specific internal revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported from the United States or foreign countries, but not to anything produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state or as an ingredient or part of any manufactured article or product."

It will thus be seen that the Philippine legislature has here defined and provided for the imposition and collection of two classes of internal revenue taxes—(1) percentage tax on merchants' sales, and (2) specific internal revenue taxes. From the enactment of Act No. 1189 on August 1, 1904, up to the approval of Act No. 2541 on January 1, 1916, the legislature expressly declared that in computing the percentage tax on merchants' sales transactions in merchandise actually exported by the vendors shall be excluded. But that express declaration was eliminated by Act No. 2541, effective January 1, 1916, and the word *"consigned"* was inserted in Section 40 of Act No. 2339 by Act No. 2622, likewise effective January 1, 1916. The word "abroad" was inserted in Section 1614 of the 1916 Code just after the new word "consigned" and carried forward into the 1917 Code. The provisions governing "specific taxes" remain unchanged from the beginning. The distinction between the "percentage tax" and the "specific tax" is quite clear. It is a distinction with a marked difference. Percentage taxes

are not of fixed amounts upon units, but are based upon the business or privilege of vending merchandise after the merchandise has lost its identity by becoming a part of the great mass of commodities. Specific taxes are of a fixed amount by "the head or number, or by some standard of weight or measurement and require no assessment other than a listing or classification of the subjects (in the original packages) to be taxed" (1 Cooley on Taxation 412).

Section 11 of the Act of Congress of August 29, 1916 (39 Stat. 545), known as the "Autonomy Act," reads in part as follows:

> "Sec. 11. That no export duties shall be levied or collected on exports from the Philippine Islands, but taxes and assessments on property and license fees for franchises, and privileges, and internal taxes, direct or indirect, may be imposed for the purposes of the Philippine Government and the provincial and municipal governments thereof, respectively, as may be provided and defined by acts of the Philippine legislature, and, where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the Philippine government or any provincial or municipal government therein, as may be provided by law and to protect the public credit. * * *."

Of the merchandise sold and consigned abroad by the respondents and upon the money value of which the percentage taxes in question were collected, the record fails affirmatively to disclose to what country or countries such merchandise was sold or consigned by Smith, Bell & Company, Ltd., Case No. 138, and the Compania General De Tabacos De Filipinas, Case No. 140. In the first it was alleged that the merchandise was sold and exported from the Philippine Islands. The answer admitted that these allegations were true. In the second it was alleged that the merchandise was exported from the Philippine Islands, being at the time of exportation, during the course

of transportation and at the time of arrival at the ports of destination, the exclusive property of the plaintiff. In the answer it was alleged that the "plaintiff consigned to its agents abroad" the merchandise mentioned in the complaint. The Visayan Refining Company, Case No. 142, alleged that the merchandise was exported from the Philippine Islands to the port of New York. The answer alleged that the merchandise was shipped from the Philippine Islands to New York, consigned to the agents of the plaintiff. No other evidence was offered in either of the cases.

Section 11 of the Act of August 29, 1916, provides "that no export duties shall be levied or collected on exports from the Philippine Islands." In *Kepner* v. *United States,* 195 U. S. 100, 124, it was said:

> "It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by a judicial decision, is presumed to be used in that sense by the legislative body."

The inquiry arises whether merchandise shipped direct from the Philippine Islands to the United States may be regarded as "exports" within the meaning of Section 11 of the Act of August 29, 1916. If the answer be in the affirmative, it then becomes immaterial as to what ports abroad, if any, the merchandise set forth in the complaints in cases numbers 138 and 140 were consigned in so far as the definition of the term "exports" is concerned.

The definition of the word "export" as given in most of the adjudged cases and elsewhere refer to the taking of goods from one country to another, this being ordinarily the only case in which export duties are imposed. There are, however, exceptions to this rule. The word may be used in reference to the taking of goods from one part of

the country to another (*Barrett* v. *Railway Company*, 2 Manning & Granger, 538, 543) or from one state to another (*Dooley* v. *United States*, 183 U. S. 151, 153). In tariff legislation, the word "exported" does not necessarily imply that the goods must be shipped to a foreign country in a technical sense. As late as August 23, 1907, the Attorney General of the United States held that "it is nevertheless clear that under the special legislation relating to the temporary organization of the Philippine Islands, they are treated as territory remaining as yet outside of the United States in a tariff sense for the purpose of imposing duties on articles shipped from them 'into' the United States analagous to those imposed on imports from a foreign country, and having such status that the term 'imports' can be naturally and properly applied to merchandise brought from them into the United States, a view which is supported by the language used in the opinion of the court in *Downes* v. *Bidwell*, 182 U. S. 244, 287," (26 Ops. Atty. Gen., 355, 360). Up to that time Congress had subjected merchandise shipped from the Philippine Islands to the United States to a customs duty differing only in amount from that imposed on merchandise from foreign countries.

By the United States and the Philippine tariff acts of August 5, 1909, a reciprocal free trade arrangement between the two countries was established. Both acts were approved on the same day, the former at 5.05 p. m., to take effect the following day; and the latter at 5.08 p. m., to take effect after sixty days. Under Section 5 of the United States Tariff Law and Section 12 of the Philippine Tariff Law, articles of American growth, product, or manufacture, upon which no drawback of customs duties had been allowed, could enter the Philippine Islands free; and in turn, all articles, the growth or product of, or manu-

factured in, the Philippine Islands, to the extent and under the conditions stated in said Section 5, could enter the United States free of duty. Such merchandise was not subject to the internal revenue tax of either country before being shipped. Section 13 of the Philippine Act provided that upon "the exportation to any foreign country from the Philippine Islands, *or shipments* thereof to the United States or any of its possessions" of certain articles, they shall be subject to export duties except as therein set forth. It was at that time and by reason of that free-trade arrangement that the words "import" and "export" began to take on a new meaning when used with reference to the shipment of goods from the one country into the other.

The above-mentioned sections 5, 12 and 13 were repealed by the Act of October 3, 1913, (38 Stat. 114, 192). By Section 4 of the Act of October 3, 1913, the provisions of Sections 5 and 12 of the Act of August 5, 1909, relating to the reciprocal free trade arrangements between the United States and the Philippine Islands, were reenacted and enlarged by removing the restrictions as to the amounts of certain articles from the Philippine Islands which should be admitted free into the United States, and repealed said Section 13. The provisions exempting the merchandise shipped from one country into the other from the payment of the internal revenue taxes before shipment were likewise reenacted.

While the enacting clause of the Act of October 3, 1913, stated that "there shall be levied, collected, and paid upon all articles when *imported* from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila) the rates of duty" set forth in the Act, paragraph C of Section 4 provides that "there shall be levied, collected, and paid upon all articles *coming into*

the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from *foreign countries; Provided,* * * *." (Italics supplied). The words "imported" and "exported" are not used in paragraph C of Section 4 in connection with the shipment of goods from the United States to the Philippine Islands or *vice versa,* but the terms "coming into," "going into" and "shipped" are employed. All articles, the growth or product of the Philippine Islands, coming into the United States from the Philippine Islands, are admitted free of duty. Hence, the Philippine Islands have thus been brought *within* the United States in a tariff sense and merchandise now shipped from the Philippine Islands into the United States cannot be held to have been *imported* in a tariff sense into this country. It is settled that the terms "imports" and "exports" as used in that clause of the Constitution which declares that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports" have reference to goods brought from or carried into foreign countries alone, and not to goods transported from one state to another (*Brown* v. *Houston,* 114 U. S. 622). "Whether the laying of such duties by a state would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, is a different question" (*Id.* 630). Section 10 of the Act of August 29, 1916, declares "That while this Act provides that the Philippine Government shall have the authority to enact a tariff law the trade relations between the Islands and the United States shall continue to be governed exclusively by the laws of the Congress of the United States: *Provided,* That tariff acts or acts amendatory to the tariff of the

Philippine Islands shall not become law until they shall receive the approval of the President of the United States, * * *." True it is that paragraph C, Section 4 of the Act of October 3, 1913, after providing that all articles, the growth or product of the Philippine Islands shipped into the United States shall be admitted free of duty, declares that such articles "shall be exempt from the payment of any tax imposed by the internal revenue laws of the Philippine Islands."

The merchandise, which was the growth or product of the Philippine Islands, was sold or consigned abroad or without the Philippine Islands by the respondents. That part of such merchandise which was consigned to persons or firms within the United States and which thereafter entered this country was not *exported* in a tariff sense from the islands. But that part, if any, which was consigned and shipped to persons and firms in *foreign countries* was *exported* from the islands. Anyway, the percentage taxes which forms the basis of these actions were not "internal revenue taxes imposed upon the shipment of goods into the United States," nor imposts or duties on exports. We have already pointed out the law touching the character and mode of the assessment of these percentage taxes. They were percentage taxes upon *transactions* involving the sale or consignment abroad of merchandise which was not in the original packages but which was a part of the general mass of goods. They were not taxes imposed upon the merchandise because of any special qualities it may have had. They were general taxes laid on all such transactions alike, based upon the gross money value of the goods involved. The assessment did not amount to any interference with, or restriction upon the free movement of the goods to any port of the world. In fact, the goods were gone *abroad* before any attempt was

made to collect the taxes. The assessment amounted only to an exercise of local administration under the general taxing power of the Philippine Government, which, though it may have incidentally affected the subject of commerce, was entirely within the power of that government. Every tax imposed directly or indirectly upon property may affect more or less the operations of commerce by diminishing the profits to be derived therefrom, but it does not for that reason amount to a regulation of commerce, within the meaning of the Constitution or Acts of Congress upon the subject. "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine." (*Brown* v. *Houston, supra*). The internal revenue tax referred to in paragraph C of Section 4 of the Act of October 3, 1913, is of the same character as a tax or duty on exports.

Crew Levick Company v. *Commonwealth of Pennsylvania, Distinguished.*

Both the Insular Supreme Court and counsel for respondents relied upon the case of *Crew Levick Company* v. *Commonwealth of Pennsylvania,* 245 U. S. 292, as authority for holding that Section 1614 of Act No. 2657 in so far as it imposes a tax of 1 per cent upon the gross value in money of goods sold or consigned abroad, was in conflict with Section 11 of the Act of August 29, 1916, wherein it is provided "that no export duties shall be levied or collected on exports from the Philippine Islands."

The essential facts are stated in the opinion of the court as follows: By an Act of May 2, 1899, the State

of Pennsylvania imposes an annual mercantile lincense tax upon each wholesale vendor or dealer in merchandise, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually," and like taxes at another rate upon retail vendors, and at still another upon vendors at an exchange or board of trade. In 1913 the Crew Levick Company sold and delivered at wholesale, from a warehouse located in Pennsylvania, merchandise to the value of about $47,000 to purchasers within the State, and merchandise to the value of about $430,000 to customers in foreign countries. The State Courts sustained the tax on the $430,000, overruling the contention that it amounted to a regulation of foreign commerce and also was an impost or duty on exports levied without authority of Congress.

The court, in reversing the judgment of the Supreme Court of the State, said (p. 295):

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.
>
> "We are constrained to hold that the answer must be in the affirmative."

There is no difference between interstate commerce and foreign commerce, says the court, in "so far as the present question is concerned." This is true because the power to

regulate commerce among the several states (except as to merely local matters) is just as exclusive a power in Congress as is the power to regulate commerce with foreign nations and with the Indian tribes.

Section 2 of the Pennsylvania Act provides "that all persons who shall sell to dealers in or vendors of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this Act to be wholesalers; and all other vendors of or dealers in goods, wares and merchandise shall be retailers." The merchandise of the wholesaler remains in the original packages until it reaches the retailer when it then becomes for the first time available to the consumer or a part of the general mass of property. Not so in respect to retail dealers. No retailer could escape the payment of one mill on each dollar of the whole volume, gross, of retail business transacted by him with citizens or residents of other states upon the ground that such a tax would be an impost upon exports, because those transactions could not in the very nature of things amount to a regulation of interstate commerce. No such tax can be deemed a duty or impost on imports or exports unless it *regulates* to an appreciable extent foreign commerce or commerce among the several states, or with the Indian tribes. Or in other words, if a particular tax is in such a form as primarily to be a rule to regulate commerce, and only a tax in its secondary effect, then it is in fact and in law an impost or duty on exports or imports. A law which imposes a tax of one-half mill on each dollar of the whole volume, gross, of business transacted annually by wholesalers is a tax upon "the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries," and it is therefore primarily a rule to regulate commerce and only a tax in its secondary effect.

Is the Philippine statute, Act No. 2657, in such a form as primarily to be a rule to regulate commerce and only a tax in its secondary effect? If it is, then the taxes therein imposed are in fact duties on exports or imports as the case may be.

Section 1593 reads in part as follows:

> "Sec. 1593. Sources of taxes.—The following taxes, fees and charges in the nature of tax are deemed to be internal revenue taxes:
>
> (a) The cedula tax.
>
> (b) The documentary tax.
>
> (c) The privilege taxes on business or occupation and on signs.
>
> (d) Specific taxes on manufactured products."

Section 1614 provides that:

> " 'Merchant,' as here used, means a person engaged in the sale, barter, or exchange of personal property of whatever character. Except as specially provided, the term includes manufacturers who sell articles of their own production and commission merchants having establishments of their own for the keeping and disposal of goods of which sales or exchanges are effected, but does not include merchandise brokers."

Section 1615 reads:

> "Sec. 1615. Sales not subject to merchants' tax. —In computing the tax above imposed transactions in the following commodities shall be excluded:
>
> (a) Things subject to a specific tax.
>
> (b) Agricultural products when sold by the producer or owner of the land where grown, or by any other person other than a merchant or commission merchant, whether in their original state or not."

The privilege taxes on the business or occupation of a merchant are of two kinds: (1) A fixed annual tax, and (2) a percentage tax on the merchandise sold, bartered,

exchanged, or consigned abroad, measured by the gross value in money at the time of the transaction. These taxes are imposed upon the *privilege* of doing business in the Philippine Islands and not upon the *right* to export or import, nor upon goods because of the fact that they are being exported or are intended to be exported or that they have been imported. The fact that some of the goods may be exported cannot make the general tax a duty on exports for the reason that the exportation is merely incidental and does not form the basis for the tax. This is especially true in the instant cases because the goods sold or consigned abroad by the respondents were all the *products* of the Philippine Islands. They were a part of the general mass of personal property of that country. They had never commenced their final movement for transportation abroad when the percentage tax attached. They were agricultural or forest products assembled for the purpose probably of exportation, but they were not exports when the transactions of sale or consignment abroad accrued. They were still within the country of their origin and a part of the general mass of property of the Islands, and liable to taxation there. (*Coe* v. *Errol,* 116 U. S. 517, and *Turpin* v. *Burgess,* 117 U. S. 504.)

While the Philippine statute, Act No. 2657, defines the term "merchant," it makes no distinction between wholesale and retail dealers as was done in the Pennsylvania Act. It also makes provisions for the refund of the taxes upon proof of the return to the Philippine Islands of the merchandise consigned abroad unsold. And transactions in commodities which are subject to a specific tax and in agricultural products when sold by the producer or persons other than merchants were not subject to the percentage tax.

Again, Smith, Bell & Company, respondents in case No. 138, was a corporation organized under the laws of the Philippine Islands. It is a "merchant"—not a wholesaler doing business with dealers in or vendors of merchandise and no others, but dealing with all persons regardless of their business or occupation. This respondent is engaged in assembling the native products and selling them in the best markets. The fact that some of its goods are actually exported by it makes no difference, because, as we have said, the goods were in the Philippine Islands and were a part of the general mass of property of that country at the time the percentage tax attached. The goods or products had not at that time ceased to be governed by the domestic law and begun to be governed by the law regulating commerce with foreign countries or with the United States. The same is true as to the other two respondents, and there are other reasons which go to show that the percentage taxes paid by them were not taxes or duties on exports within the meaning of Section 11 of the Act of August 29, 1916. Those taxes were paid upon the *transactions* involved in the consignment of the native products abroad. In so far as the percentage tax on such transactions by merchants was concerned, those products were not exports even on arrival at their destination because the title did not pass and they therefore became no nearer the consumer as they did not then enter the markets. The products could probably be considered exports while in route in respect to *transportation* and *intercourse*, but not otherwise.

In *Crew Levick Company* v. *Commonwealth of Pennsylvania, supra,* that company was a wholesale dealer in merchandise in unbroken or original packages, and was not engaged in assembling the native products of the State

by purchasing them from any and all persons regardless of their business or occupation.

PART II.

The collection of the taxes in question legalized and ratified by the Acts of Congress of July 1, 1916, and June 4, 1918.

As pointed out above there were three periods pertinent to the present inquiry during which the percentage taxes on merchants' sales were imposed. The first period was from January 1, 1916, to July 1, 1916, under the provisioins of Act No. 2541, as amended by Act No. 2622; the second period was from July 1, 1916, to October 1, 1917, under Section 1614 of Act No. 2657; and the third period was subsequent to October 1, 1917, under Section 1459 of Act No. 2711. All the taxes now in question were levied and collected during the second period and under the provisions of Section 1614 of Act No. 2657.

By the Act of Congress approved July 1, 1916 (39 Stat. 262, 286), it was provided:

> "That the internal revenue taxes imposed by the Philippine legislature under the law enacted by that body on December twenty-first, nineteen hundred and fifteen (Act No. 2541), as amended by the law enacted by that body on February fourth, nineteen hundred and sixteen (Act No. 2622), and the tonnage tax on vessels engaged in foreign trade, enacted by that body on February fourth, nineteen hundred and sixteen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

And by Act of Congress approved June 4, 1918 (40 Stat. 594, 597), it was provided that:

> "The taxes imposed by the Philippine Legislature in section fourteen hundred and fifty-nine of the Act numbered twenty-seven hundred and eleven, enacted by that body on March tenth, nineteen hundred and seventeen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified, and confirmed hereby as fully to all intents and purposes as if the same by prior Act of Congress specifically had been authorized and directed."

The three actions were commenced by filing the complaints on February 7, 1918 (R. 1, No. 138), on January 24, 1917, (R. 1, No. 140) and on January 20, 1917 (R. 1, No. 142), respectively. Final judgments, in so far as the Insular Supreme Court was concerned, were entered, as shown in the statements of facts, on March 15, 1920, on March 16, 1920, and on March 18, 1920. The result is that the first act of Congress was approved before either of these actions was instituted and that the second Act became effective before the final judgments in the sense indicated were entered. The court below having held that the Acts of Congress did effectively legalize, ratify and confirm the collection of the taxes levied and collected under the provisions of the Acts therein specifically mentioned, we will confine our argument under this sub-heading to the question whether the taxes levied and collected under the provisions of Section 1614 of Act No. 2657 were also legalized and ratified by the one or the other or both of the said Acts of Congress. The power of Congress in the premises will be inquired into in considering the force and effect of the Act of Congress of June 5, 1920 (41 Stat. 1015, 1025).

Under Section 2 of Act No. 2541, amending Section 40 of Act 2339, merchants were required to pay 1 per cent

"on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, or exchanged by them." By Section 3 of the same Act, Section 41 of Act No. 2339 was amended by eliminating the phrase "merchandise actually exported by the vendor." And Act No. 2622 amended Section 40 of Act No. 2339, as amended by Section 2 of Act No. 2541, so as to require merchants to pay 1 per cent "on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, *consigned,* or exchanged by them."

The enacting clause of Act No. 2657, known as the Administrative Code of 1916, reads:

> "The general statutes relative to the organization and administration of the Philippine Government as revised, compiled, and codified pursuant to the provisions of Act Numbered nineteen hundred and forty-one are hereby adopted and enacted into law, effective upon the first day of July, nineteen hundred and sixteen as follows:"

Section 1614, *supra,* requires merchants to pay a tax of 1 per cent "on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or *consigned abroad* by them * * *. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold."

The "final section" reads in part as follows:

> "The Acts and parts of Acts enumerated in the following schedule are hereby repealed: (a) Acts repealed in entirety; * * * No. 2622; (b) Acts repealed in part; * * * No. 2541, Sections 1, *2, 3,* 6, 8, 9, 16, 17, and 18."

The enacting clause of Act No. 2711, "An Act amending the Administrative Code," reads as follows:

"For the purpose of adapting it to the Jones Law (Act of Congress of August 29, 1916, 39 Stat. 545) and the reorganization Act (Act No. 2666), Act Numbered two thousand six hundred and fifty seven, known as The Administrative Code, is hereby amended in certain particulars; and said Act shall hereafter read as follows: Section 1—Title of Act. —This Act shall be known as the Administrative Code."

The first paragraph of Section 1459 of this Act is exactly the same as the first paragraph of Section 1614 of Act No. 2657, *supra,* except the phrase in that paragraph "such tax to be based on the actual selling price or value at which the things in question are disposed of or consigned" is now made to read "such tax to be based on the actual selling price or value of the things in question at the time they are disposed of or consigned." This is a mere rearrangement of the words without changing the meaning of the phrase.

The "final section" of Act No. 2711 reads in part as follows:

"Final section.—This Act shall take effect upon the first day of October, nineteen hundred and seventeen; but the Governor-General may proclaim any part hereof to be in effect at any time subsequent to its approval and prior to said date.

"The Acts and parts of Acts enumerated in the following schedule are hereby repealed:

"(a) Acts repealed in entirety.

"* * *. Act No. 2541, * * *, 2622."

The Act of July 1, 1916, *supra,* legalized and ratified the internal revenue taxes imposed under Act 2541, as amended by Act 2622, and legalized, ratified and confirmed the collection of all such taxes heretofore or hereafter made thereunder. So long as that law remained in force, the imposition and collection of taxes in accordance therewith had Congressional sanction. All merchants

"not herein specifically exempted" were required to pay 1 per cent on all the merchandise sold, bartered, consigned, or exchanged by them, and transactions in merchandise actually exported by the vendors were not excluded by express language. No provisions were made for the refund of the taxes upon the things consigned abroad upon satisfactory proof of the return thereof to the Philippine Islands unsold. There was room for argument as to whether the legislature intended to impose the tax upon transactions in merchandise actually *consigned abroad* by the vendors. The word "consigned" could have been used in the sense of limiting the transactions to the Philippine Islands. This view finds support in the fact that no provisions were then made for a refund of the taxes under the conditions subsequently stated, and in the further fact that Act No. 2657 repealed Act No. 2622 in its entirety and sections 2 and 3 of Act No. 2541. However this may be, we do not press that point.

The question whether the Act of June 4, 1918, *supra*, did effectively legalize and ratify the collection of the taxes imposed under the provisions of Section 1614 of Act. No. 2657 is, we think, practically free from doubt. That Congress legalized and ratified the taxes imposed in Section 1459 of Act No. 2711, enacted March 10, 1917 (effective October 1, 1917), and legalized, ratified, and confirmed the collection of all such taxes *heretofore* or hereafter made thereunder is clear. The inquiry arises whether Congress intended to extend the effect of its Act to Section 1614. In pursuing this inquiry, it will be remembered that the "first period" was covered by the Act of July 1, 1916; and the "third period" by the Act under consideration. Why should the "second" or middle period be left out? All the taxes were imposed, it was claimed, upon exports and were therefore illegal.

The enacting clause of Act No. 2711, "An Act Amending Administrative Code," declares that Act No. 2657 "is hereby amended in certain particulars; and *said Act* shall hereafter read as follows:" (italics supplied). While there are under the "final section" lists of "Acts repealed in entirety" and of "Acts repealed in part," Act No. 2657 does not appear in either. And the first paragraph of Section 1459 is exactly the same as the first paragraph of Section 1614 of Act 2657, except the rearrangement of certain words in the manner just indicated.

The Court below held that—

> "Act No. 2711 (Section 1459) expressly repealed Section 1614 of Act No. 2657. The amendment of Section 1459 of Act No. 2711 made no important changes in Section 1614 of Act No. 2657. * * *.
>
> "The defendant-appellant contends that the Act of Congress of June 4, 1918, had the effect of ratifying Section 1614 of Act No. 2657. There might be some merit in that contention if Congress had ratified or recognized the authority of the Philippine Legislature to impose an export tax. Upon the contrary, however, we find (a) that Congress, in Section 11 of the Jones Law, expressly deprived the legislature of such power and (b) by said Act of June 4, 1918, ratified only the particular Act (2711) by mentioning the particular section in question. The ratification can only be held to be a ratification of the law mentioned in it. If Congress had intended to ratify the general power in the Philippine Legislature and that specific Act, it would have so stated and would not have ratified and legalized a specific section of a specific law. The ratification cannot be held to go beyond its terms. * * *." (*Rafferty* v. *Smith, Bell & Co., Ltd.*, No. 138 (R. 13, 15).

That there was error in deciding that Section 1614 of Act No. 2657 was expressly repealed by Section 1459 of Act No. 2711 is quite clear. While Act No. 2657 was

amended in "certain particulars; and *said* Act shall hereafter read as follows," there was no amendment except in "certain particulars" and Section 1614 was not one of those "particulars." It was given a new section number but nothing more. It remained a part of "said Act." We agree with the Insular Supreme Court that Congress, "by said Act of June 4, 1918, ratified only the particular Act (2711) by mentioning the particular section in question. The ratification can only be held to be a ratification of the law mentioned in it." But the law mentioned in the Act of June 4, 1918, is Section 1459 of Act No. 2711 which is Section 1614 of Act No. 2657—one and the same thing. That Congress intended to ratify the collection of the taxes in question is apparent from the Senate and House Hearings on Deficiency Appropriations, 1918 and 1919, pp. 403-405. While the hearing was had on May 21, 1918, it was based on a letter from the Secretary of War dated January 7, 1918, just a little over three months after Act No. 2711 became effective. In that letter the Secretary of War in reviewing the subject states that the percentage tax law was amended so as to make it specifically applicable to goods "consigned abroad;" that the Governor-General had advised the Department that the Court of First Instance had decided that the tax of 1 per cent on the gross value of goods consigned abroad was a tax on exports and prohibited by the Jones Law; that an appeal had been taken to the Supreme Court; and that if the decision of the lower court was affirmed the Philippine Government would have to refund approximately $2,000,000 to exporters who had naturally protected themselves in the payment of this tax by an extra charge on the goods sold. The Chairman of the Committee, referring to the letter of the Secretary of War, then stated that the Secretary's letter proposed the

ratification of a provision levying a tax upon goods consigned abroad in order to ratify collections then having been made to the extent of $2,000,000, and to permit the continuation of the same taxes.

As heretofore indicated, the Act No. 2711 became effective October 1, 1917, the first day of the last calendar quarter of that year. Under Section 1458 of Act No. 2711, the percentage taxes were payable at the end of the quarter but the merchant could avoid the penalty by making his return and paying the taxes at any time before the twentieth day of the incoming month. It is therefore plain that the Governor-General did not have in mind the percentage taxes collected under Section 1459 of Act No. 2711 when he advised the Department that the court had decided that the tax of 1 per cent on the value of goods consigned abroad was prohibited by the Jones Law and that if that decision was affirmed on appeal the Philippine Government would have to refund about $2,000,000 to exporters, because such taxes had not yet been collected. He referred to the taxes collected under Section 1614 of Act No. 2657 subsequent to the approval of the Jones Law.

For the foregoing reasons, we insist that the Insular Supreme Court erred (a) in deciding that the collection of the percentage taxes imposed in Section 1614 of Act No. 2657 was not ratified and confirmed by the Act of June 4, 1918, and (b) in holding that said Section 1614 was repealed by Section 1459 of Act No. 2711.

ERROR TO ALLOW INTEREST.

These three suits against the Collector of Internal Revenue for the Philippine Islands are suits against the Philippine Government (*Lankford* v. *Platte Iron Works*,

235 U. S. 461). While prior provisions of law governing the recovery of taxes paid under protest had no express prohibition against the allowance of interest, Section 1579 of Act No. 2711, effective October 1, 1917, expressly provides that actions may be brought against the Collector of Internal Revenue for the recovery, *without interest,* of the sums alleged to have been illegally collected as taxes. At the time of the institution of the action by Smith, Bell & Co., Ltd., and at the time judgments were ordered by the Court of First Instance in the other two cases, Section 1579 was in force. Judgments for interest could not therefore properly be awarded (*Ex parte McCardle,* 7 Wall., 506, 574). But it is said that interest was allowed by the Philippine Supreme Court not against the government but against an individual, James J. Rafferty, although the judgments for the refund of the amounts of the taxes are to be paid by the government from the public treasury. This argument fails to recognize the fact that Rafferty acted as an official of the government under a statute which authorized and directed him to collect the taxes in question. The claim is not predicated upon any misconduct of Rafferty.

ERROR TO ALLOW COSTS.

The Insular Supreme Court allowed costs in the case of Smith, Bell & Co., Ltd., No. 138. The rule is well settled that, unless expressly authorized by statute, a judgment for costs either in civil or criminal cases cannot be rendered against the United States or a state in which either is a party. If authorities were necessary to support this proposition, we would invite the court's attention to those cited by Mr. Justice Malcolm in his dissenting opinion in this case (R. 17-18). The rule is the same

in the Philippine Islands. "The practice has, however, been not to allow costs in cases in which the Government of the Philippine Islands or a nominal representative of the Government is the unsuccessful party. And this is right—for the Government of the Philippine Islands is sovereign in the sense that a State of the American Union or Porto Rico is sovereign, and this paramount power has not by statute permitted itself to be taxed with costs" (*Hongkong & Shanghai Banking Corporation* v. *Rafferty*, 39 Phil. Reps. 145, 154). The fiction that the suit is against the individual and not against the Philippine Government calls for no consideration whatever at this late day.

PART III.

The Act of June 5, 1920, legalized, ratified, and confirmed the collection of the taxes in question.

It will be remembered that the three actions were commenced in the trial court by the filing of the complaints in February, 1918, and January, 1917, and that final judgments, in so far as the Insular Supreme Court was concerned, were entered in March, 1920. The pertinent provisions of the Act of Congress approved June 5, 1920 (41 Stat. 1015, 1025), read as follows:

> "The taxes imposed by the Philippine legislature in Section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

As this language is in our judgment unambiguous and manifests as explicitly as can be done the purpose of Con-

gress to legalize, ratify, and confirm the collection of *all* the taxes imposed under the provisions of Section 1614 of Act No. 2657, the question whether Congress possessed that power is, we think, the determinative factor. The case of the *United States* v. *Heinszen & Company*, 206 U. S. 370, is authority for the reduction of the controversy to its ultimate issue. In that case Heinszen & Company, the claimant below, instituted its action, on July 1, 1902, in the Court of Claims "to recover the amount of tariff duties exacted in the Philippine Islands on merchandise brought from the United States, the duties having been collected under the authority of the President after the ratification of the treaty, but before the time when Congress, by Section 1 of the Act of March 8, 1902, had enacted tariff duties for the Philippine Islands. The case was pending in the Court of Claims when the Lincoln and Warner, Barnes & Company cases were decided by this court" (206 U. S. 381). The Court of Claims overruled, on January 7, 1907, the demurrer of the United States, defendant below. *Conrad Heinszen et al.*, v. *United States*, 42 Ct. Cls. 58. The case was argued in the Supreme Court of the United States on April 9, 10, 1907, and decided May 27, 1907. By Act of Congress of June 30, 1906 (34 Stat. 636), it was provided:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and rati-

fied and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

After quoting the foregoing provisions of the Act of June 30, 1906, the Court of Claims observed that:

> "It must be admitted that this provision is unmistakable in its language and broad enough to completely cover the case if it is possible for Congress so to do." (p. 68.)

That court held the Act unconstitutional upon the ground "that retrospective statutes relating to defects in tax proceedings are valid only to the extent of curing such defects as are in the nature of irregularities, and cannot extend to matters of jurisdiction." (p. 74.)

On review, the Supreme Court of the United States (206 U. S. 370, 382), while agreeing with the Court of Claims that "such tariff exactions were illegal," said:

> "It follows therefore that the only question open for consideration is whether the court below erred in refusing to give effect to the Act of Congress of June 30, 1906, which ratified the collection of the duties levied under the order of the President."

The court, after an exhaustive examination of the authorities, held that the Act in question was effectively curative and reversed the judgment of the Court of Claims. Hence, it must be conceded that if the cases under consideration had been pending in the Court of First Instance, as was the case of the *United States* v. *Heinszen & Company,* recovery would be completely foreclosed by the Act of June 5, 1920, *supra.*

Did the fact that the actions now under consideration had ripened into final judgments to the extent heretofore stated operate to deprive Congress of its power to ratify the collection of the taxes? We think not. The judg-

ments were not final in the sense that they disposed of the litigation between the parties to the actions.

Section 27 of the Act of August 29, 1916 (39 Stat. 545, 555), provides:

> "That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds $25,000, or in which the title or possession of real estate exceeding in value the sum of $25,000, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the district courts of the United States."

And Section 5 of the Act of September 6, 1916, (39 Stat. 727), provides:

> "That no judgment or decree rendered or passed by the Supreme Court of the Philippine Islands more than sixty days after the approval of this Act shall be reviewed by the Supreme Court upon writ of error or appeal; but it shall be competent for the Supreme Court, by certiorari, or otherwise, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error or appeal, any cause wherein, after such sixty days, the Supreme Court of the Philippine Islands may render

or pass a judgment or decree which would be subject to review under existing laws."

Section 6 of the Act of September 6, 1916, *supra,* provides that writs of certiorari addressed to the Supreme Court of the Philippine Islands must be applied for within six months after the entry of the judgment or decree complained of. This provision was complied with in each of the three cases under consideration.

The power of this court to review the judgments and decrees of the Supreme Court of the Philippine Islands is limtied to the two general classes of cases mentioned in Section 27 of the Act of August 29, 1916, *supra.* In the one it is the nature of the case, and in the other it is the amount involved, which are the tests of jurisdiction. If a particular case is one which falls within the first general class because the Constitution or a statute of the United States is "involved," then it will be necessary to inquire whether the "matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error (*Lau Ow Bew, Petitioner,* 141 U. S. 583, 587).

In case No. 138, Rafferty, etc *v.* Smith, Bell & Company, the last paragraph of the opinion of the Insular Supreme Court promulgated on January 26, 1920, reads:

> "Ten days after notice of this decision final judgment will be entered, and five days thereafter the record will be remanded to the court below." (R. 17.)

On January 26, 1920, the Attorney General, on behalf of the Collector of Internal Revenue, moved for a reconsideration (R. 19). This motion was denied on March 11, 1920, and the judgment entered on March 15,

1920 (R. 24). On March 16, 1920, the Attorney General, on behalf of the Collector of Internal Revenue, excepted to the decision of the court in denying the motion for a reconsideration and also to the final judgment entered therein, and notified the Insular Supreme Court that the Collector intended to petition the Supreme Court of the United States for a writ of certiorari and at the same time petitioned the Insular Supreme Court for the retention of the record in that court and a stay of the judgment pending the application for the writ (R. 25). The Insular Supreme Court on March 19, 1920, ordered the record retained under its jurisdiction for a period of six months (R. 25). Essentially the same proceedings in this regard were had in the other two instant cases.

As the judgments in these three cases fixed definite amounts, with interest, to be refunded to the respective tax payers, they were final within the meaning of Section 27 of the Act of August 29, 1916, for the purpose of review by certiorari, but that they were not final in the sense of *terminating* the litigations between the parties is evidenced by the fact that each of the cases is now being re-examined by this court with full authority to "revise, reverse, modify, or affirm" those judgments or either of them, all questions touching the power of the court so to dispose of the cases under Section 27 of the Act of August 29, 1916, and Section 5 of the Act of September 6, 1916, having been settled in granting the writs of certiorari.

CONSTITUTIONAL THEORY OF THE GOVERNMENT OF THE UNITED STATES, OF THE INDIVIDUAL STATES, AND OF THE PHILIPPINE ISLANDS.

Before proceeding further with the inquiry as to whether Congress possessed the power to ratify at that

time (June 5, 1920) the collection of the taxes imposed under Section 1614 of Act No. 2657, it might be well briefly to examine the constitutional theory of the Government of the United States, of the individual states as such, and of the Philippine Islands.

Congress, in enacting laws for the Philippine Islands, possesses and exercises all the attributes of sovereignty; whereas in enacting laws for the states, Congress possesses and exercises only that portion of sovereignty delegated to it. The validity of an Act of Congress depends upon whether the Constitution of the United States contains a grant of express or implied authority to enact it. State legislatures enact laws subject to the limitations imposed by the Federal and State constitutions. An Act of a State legislature is valid unless the Federal or State constitution expressly or impliedly prohibits its enactment. The Philippine Islands is neither a state nor an organized territory, although the form and organization of its government somewhat resembles that of both. The government of the Philippine Islands is a creation of the United States, acting through the President and Congress, both deriving power from the same source but from different parts thereof. For its powers and the limitations thereon the Government of the Philippines looked to the orders of the President before Congress acted and the Acts of Congress after Congress assumed control. Within the limits of its authority the Government of the Philippine Islands is a complete governmental organism with executive, legislative and judicial departments exercising the functions commonly assigned to such departments. The Philippine legislature enacts laws subject to the limitations of the Organic Laws of Congress. Such being the constitutional theory of the Government of the Philippine Islands it has been held (*United States* v. *Bull*, 15

Phil. Rep. 7; *Severino* v. *Governor-General*, 16 Phil. Rep. 366) that the courts in that country must consider the validity of an Act of the Philippine legislature as a State court considers the validity of an Act of the State legislature.

POWER OF STATE LEGISLATURES TO RATIFY AND MAKE VALID TAXES LEVIED OR LEVIED AND COLLECTED WITHOUT PRIOR AUTHORITY.

In *The Baltimore and Susquehanna Railroad Company* v. *Alexander Nesbit and Penelope D. Goodwin*, 51 U. S. 395, 401, the court said:

> "That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the Federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus in the case of *Watson et al.* v. *Mercer*, 8 Pet., 110, the court say: 'It is clear, that this court has no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court, that the phrase *ex post facto* is not applicable to civil laws, but to penal and criminal laws.' For this position is cited the case of *Calder* v. *Bull*, already mentioned; of *Fletcher* v. *Peck*, 5 Cranch 138; *Ogden* v. *Saunders*, 12 Wheat., 266; and *Satterlee* v. *Matthewson*, 2 Pet., 380."

In *Thompson* v. *Lee County*, 70 U. S. 327, at an election held in Lee County, Iowa, in 1856, it was decided, or so said to be, that the County take stock and issue bonds to three different railroads. The validity of the subscription having been contested, the court, in December, 1856, held that the election was irregular, and conferred no power to issue the bonds. The legislature of the State accordingly passed a Curative Act, legalizing the proceedings and vote. Soon after the bonds were issued the county laid a tax to meet the interest due on the coupons. The legality of the tax was denied by some taxpayers of the county, but the court of last resort in the State having declared it lawful (*McMillen* v. *The County Judge*, 6 Iowa 391), the money was collected and the coupons paid for a short time. The court, however, subsequently reviewed and reversed its former decision; and the tax being no longer levied the coupons were no longer paid. A number of them being in the hands of Thompson, he brought suit in the Federal courts of Iowa to recover them. The court charged among other things "that the 'Curative Act,' of January, 1856, gave no validity to the bonds." The Supreme Court of the United States, after stating that the courts of Iowa having, when these bonds were issued, construed their constitution and laws so as to give them force and vitality, cannot, by a subsequent and contrary construction, destroy them, said at page 331:

> "But it is argued that when the county of Lee voted to take the stock for which these bonds were given, they attempted the exercise of a power which had not been delegated to them, or executed it so defectively, that their proceedings were without authority of law, and void.
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> "It is not instructive to inquire into the different laws of Iowa under which this power is claimed to

exist, because the legislature of that State, on the 28th day of January, 1857, by an Act of confirmation, legalized the issue of these bonds."

In *United States* v. *Heinszen & Company, supra,* the court, at page 382, said:

"That where an agent, (and the Philippine Government is an agent of Congress) without precedent authority, has exercised in the name of a principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized Act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments or municipal corporations, is also elementary."

In *Boardman* v. *Beckwith, et al.,* 18 Iowa, 292, the property in question was sold by the treasurer on the first Monday in October, 1860, for the delinquent taxes of 1858, and deed made October 20, 1863. There was no law in force authorizing the levy or collection of taxes for the year 1858, but taxes were in fact levied and collected for that year under the laws in force prior to 1858. A Curative Act was passed by the General Assembly on April 2, 1860. In passing upon the constitutionality of that Act, the court used this language (p. 294, 295):

"Whatever doubt there might be, if the Act of 1860 had taken effect after the sale and purchase under which the plaintiff claims, there can be no room for controversy when it is remembered that it was passed and took effect long prior to that time (this Act took effect May 9, 1860). That it is competent to thus legislate we entertain no doubt. The power of the legislature to pass acts of this character, conducive as they are to the general welfare, and based upon considerations of controlling public necessity,

is, in our opinion, undoubted. It does not interfere with vested rights, nor impair the obligation of any contract."

In *The Iowa Railroad Land Co.* v. *Soper et al.*, 39 Iowa 112, the plaintiff filed its petition on April 7, 1874, alleging that for the year 1871 the defendants levied upon all property judgment taxes in addition to the maximum levy allowed by law; that it paid said illegal and unauthorized taxes in January, 1872; and that the treasurer failed and refused to refund the amount thus paid. The Supreme Court of the State having held in June, 1873, in another case, that the county authorities had no power to levy the tax complained of, the General Assembly passed, on March 18, 1874, an Act ratifying and legalizing the imposition and collectoin of those taxes.

It was urged that the Act of March 18, 1874, was void because it was retrospective and impaired vested rights and without reasonable cause imposed upon third persons new duties in respect to past transactions. It was held (citing *Bennett* v. *Fisher*, 26 Iowa, 497) that there was nothing in the State constitution prohibiting in terms the enactment of retrospective laws, that such laws are valid, unless they violate some of the provisions of the National or State constitutions. The court cited with approval the case of *The State* v. *Squires*, 26 Iowa, 340, holding that retrospective laws, as distinguished from *ex post facto* laws, are not in conflict with the constitution of the United States, nor of the State of Iowa; that in the absence of any constitutional inhibition, a state legislature has the power to pass retrospective or retroactive laws, and that they will be declared inoperative only when they disturb or interfere with vested rights. The court then says that "we are unable to see wherein the Act (March 18, 1874) interferes with any vested rights," and again citing *The*

State v. *Squires, supra,* "nor is it material that a cause was pending, involving the question of the validity of the proceeding sought to be cured, when the act curing it was passed."

In *Grim* v. *Weissenburg School District,* 57 Pa. St. 433, the plaintiff under threat of distress and under protest paid the tax between the 10th and 15th of August, 1864, and on the 20th of the same month brought suit to recover back the amount thus paid. The Curative Act was passed on August 25, 1864. The court, in holding the Act constitutional, said, at page 435, among other things, that:

> "If an Act of Assembly be within the legitimate scope of legislative power, it is not a valid objection that it divests vested rights. There is no clause, either in the Constitution of the United States or of this Commonwealth, which prohibits retrospective laws. The legislature cannot impair the obligation of a contract, or pass an *ex post facto* law, for both these are expressly forbidden. But an *ex post facto* law is one which makes an act punishable in a manner in which it was not punishable when it was committed: *Fletcher* v. *Peck,* 6 Cranch 138. *Ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. Retrospective laws and state laws divesting vested rights, unless *ex post facto* or impairing the obligation of contracts, do not fall within the prohibition contained in the Constitution of the United States, however repugnant they may be to the principles of sound legislation: *Calder* v. *Bull,* 3 Dallas 386; *Satterlee* v. *Matthewson,* 2 Peters 413; *Watson* v. *Mercer,* 8 Peters 88."

A great number of other cases from state courts might be cited where this question is discussed and decided; and in nearly all of the well considered cases among them the

rule that state legislatures have the power to pass retrospective or retroactive laws, and that they will be declared inoperative only when they impair vested rights, is maintained. The same cases further hold that such laws, although retrospective and legalize taxes which were levied or levied and collected without any shadow of legal authority, and the levies were therefore utterly void, are nevertheless constitutional and operative, provided the legislature had the power to authorize the levy and collection of such taxes in the first instance and that no vested rights are thereby impaired. There are cases holding that retrospective statutes, attempting to cure the levying and collection of taxes for which there was no authority whatever, are unconstitutional because they are directed against vested rights of particular individuals or classes. This difference in the views of the state courts appears to rest very largely upon the scope and meaning of the term *"vested rights."*

As the exercise of judicial power is not within the constitutional authority of legislatures, that power being confided to the courts, if follows that when vested rights are divested by legislative acts of this character, they will be adjudged inoperative and void by the courts (*The Iowa Railroad Land Co.,* 39 Iowa 112, 123, *supra,* citing *Bagg's Appeal,* 7 Wright, (44 Pa. St.) 512. Legislative sentences cannot be legally imposed. Thus, in *Dash* v. *Van Kleeck,* 7 Johns. 477, cited in *The Iowa Railroad Land Co., supra,* the sheriff suffered a prisoner to escape by reason of which the sheriff became liable to the creditor. The prisoner returned to the custody of the sheriff, who, on going out of office, assigned him to his successor, and while in his custody the prisoner applied for his discharge under an Act for the relief of debtors, etc.; and the plaintiff, not knowing of the escape, opposed the application,

in consequence of which the debtor prisoner remained in custody. After the institution of the action against the sheriff who suffered the escape, an Act was passed by the legislature permitting sheriffs to plead the prisoner's return to custody as a defense to an action for an escape. It was held that this act did not operate retrospectively so as to divest the vested right of action which accrued to the plaintiff by the escape. The ground upon which the court based the decision is, that, as the sheriff, in suffering his prisoner to escape, became liable absolutely to the plaintiff for the debt, such liability was a vested right which could not be taken away by a retroactive law. That was a rested right of property which carried with it an equally vested right of action. Take away the right of action, and the property right would be worthless. But the legalizing of the imposition and collection of a tax, which but for the Curative Act was invalid and not capable of being enforced, does not impair any vested right of the tax-payer. The right of action which the tax-payer had, before the passage of the Curative Act, to recover back the illegal taxes paid is no more a vested right than in case he had not paid the taxes. He has just as good grounds for resisting payment, as, after payment, he could have to recover the money paid. Before taxes are assessed against the property of the tax-payer, in accordance with a statute for that purpose, he may lawfully claim the right to resist a claim made upon him for taxes not thus assessed. He has a right of action to enjoin the sale of his lands, or may replevy his personal property if seized for illegal taxes. But upon the regular levy of taxes in pursuance of a legislative enactment, his rights in this respect are changed. His right to resist the payment of the taxes is gone. The statute has created a liability to pay where none existed before its passage, and this is

so whether the act authorizing the tax levies be passed prior thereto or is an act legalizing a tax previously levied. In either case the power of the legislature to pass the law is the same. If it has no power to legalize a tax already levied without authority, it has no power to confer the authority in the first instance. If the right to resist payment of taxes assessed without authority of law is a vested right which cannot be taken away by any legislative act, then the legislature has no power to tax at all, for every statute which provides for taxing the persons or property of the citizens has the effect of creating liabilities where none existed before the passage of the statute. (*The Iowa Railroad Land Co.* v. *Soper, supra.*)

It is well settled by the state courts that the fact that the Curative Act was passed while a cause was pending, involving the legality of the proceeding sought to be cured, does not affect its validity. The power of the legislature is not dependent upon any circumstance of that character. It is just as competent for the legislative body to legislate upon the subject while an action is pending as before its commencement. No one can acquire a vested right by the mere act of bringing suit. A suit is only the assertion of an alleged existing legal right (Cooley on Constitutional Limitations, 7th Ed., p. 543). But what about the rights of a plaintiff who had obtained a final judgment for the refund of the amount of the taxes illegally paid, thereby disposing of the litigation before the passage of the Curative Act? Would such an act justify the custodian of the funds in declining to turn over the money notwithstanding the finality of the judgment, or, in case the judgment had been satisfied, could the particular plaintiff be again compelled to pay the same amount?

While it may not be necessary to attempt to answer these questions for the reason that the judgments in the

cases at bar were not *final* at the time the Congressional Curative Act was passed, yet a few observations might be helpful. Referring again to the case of *The Iowa Railroad Land Company* v. *Soper, et al., supra,* it will be remembered that the illegal and unauthorized taxes were paid in January, 1872, while the Curative Act was not passed until 1874. The first section of that act reads as follows:

> "Section 1. *Be it enacted by the General Assembly of the State of Iowa,* That such judgment taxes, so levied by such corporations, be, and the same are hereby declared legal and valid, and where the same have not been paid, the officers of such corporations are hereby empowered and directed to proceed at once to collect the same as other taxes are collected, and pay the same over to the parties entitled thereto."

The levy of the taxes was legalized and validated, and where the same had not been paid, the officers were empowered and directed to proceed at once with the collection. The entire assessment was ratified and every tax-payer was thereby made liable for the payment of the tax theretofore assessed against him. On the date of the passage of the Curative Act the individual status of the hereinafter mentioned farmers and tax-payers living in the same community, with respect to the taxes, was, let us say, as follows: A had already paid his taxes without protest; B, C and D had paid their taxes under protest, each instituting on the same day an action to recover the taxes thus illegally imposed and collected. B's suit had reached final judgment which had been satisfied by refunding the amount paid. C's action had also reached a final judgment disposing of the litigation between the parties, but the judgment had not been satisfied by refunding the amount of the taxes. D's action was still in

process of adjudication; E had not paid his taxes; and F paid his taxes under protest, and subsequent to the passage of the Curative Act, instituted an action to recover back the amount thus paid. What is the difference between the rights and liabilities of these various tax-payers in respect to the judgment taxes? The judgment taxes were levied upon all the taxable property in the county for the purpose of paying certain judgments rendered against the county prior thereto, founded upon the ordinary warrants of the county issued for the ordinary expenses thereof. Thus, all the tax-payers received a like and equal benefit, and must carry a like and equal burden unless some intervening event brings about such a change in the situation of the parties as to relieve one or more from paying his share of the common burden by reason of having acquired certain vested rights. A has no rights which he could successfully assert because he did not pay under protest, protest being necessary to the maintenance of an action to recover. The pending action of D could not relieve him from the payment of the ratified tax. The officers were directed to proceed at once to collect the taxes assessed against E. F occupies exactly the same position as that occupied by the Iowa Railroad Land Company in the case against Soper et al. We have been unable to find where the cases of B and C have been specifically dealt with by the highest court of any state. The others have been definitely settled. Should B and C escape all liability because they happened to be a little more active or encountered more favorable circumstances in the prosecution of their actions for a refund? Plain and simple justice answers the question in the negative. According to the very nature of things, neither B nor C could have acquired a vested right which the Constitution protects.

THE POWER OF CONGRESS TO RATIFY AND MAKE VALID TAXES LEVIED AND COLLECTED WITHOUT PRIOR AUTHORITY. CONSTITUTIONALITY OF THE ACT OF JUNE 5, 1920, *SUPRA*.

The argument for the unconstitutionality of the Act of June 5, 1920, was placed by counsel for respondents in opposing the applications for writs of certiorari upon the ground that at the time of its passage each of the respondents had a vested right to recover back from the petitioner as Collector of Internal Revenue the money which it had been compelled to pay without authority of law and that this vested right the Congress could not divest, the vested right of each being the judgment entered by the Insular Supreme Court at the time heretofore stated. The argument proceeded along the lines that Congress, in legislating for the Philippine Islands, is subject to those "fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments" such as that imbedded in the Fifth Amendment wherein it is declared that "No person shall be deprived of life, liberty, or property without due process of law," and that the judgment in each of the cases being absolutely final, it was therefore property within the meaning of that amendment.

An extended argument of the questions whether a final judgment is a contract and whether the Act of June 5, 1920, impairs the obligation of that contract is wholly unnecessary (a) because the judgments were not final, as we will attempt to show later, and (b) because the inhibition against the exercise of such a power which is contained in Section 10, Article I of the Federal Constitu-

tion, is not addressed to Congress but to the legislatures of the several states.

Again, with respect to retrospective or retroactive laws, it is sufficient to observe that Congress is not prohibited from passing such laws, and that the Act of June 5, 1920, is not an *ex post facto* law.

It was strongly urged by counsel for respondents in his brief opposing the granting of the writs in these cases that Congress cannot deprive, by legislative enactment, any person in the Philippine Islands of his property without due process. A number of well considered cases were cited in support of this proposition. *We find it unnecessary, if we were so disposed, to press a contrary view for the reason that the Act of June 5, 1920, falls short of taking the property of the respondents without compensation or due process of law.* While there is no express or implied limitation in the Constitution and its amendments on the power of Congress in legislating for the Philippine Islands, by which that body is restrained from the widest latitude of discretion, "it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended" (*Downes* v. *Bidwell*, 182 U. S. 244).

THE JUDGMENTS UNDER REVIEW WERE NOT PROPERTY, IF IT BE ADMITTED THAT THEY WERE FINAL ON JUNE 5, 1920.

Considered as an original proposition, the weight of reason and justice sustain the view that the judgments in question, if it be admitted that they were final at the time of the passage of the Curative Act, were not property within the meaning of the Fifth Amendment to the Constitution of the United States.

We assume that no one will now contend that the Congress of the United States was without power to bestow upon the legislature of the Philippine Islands authority to enact Section 1614 of Act No. 2657 and to collect the taxes imposed therein, whether or not such taxes or any part thereof were in fact duties on exports.

Upon the question of vested rights in judgments, counsel cites the general rule laid down in 6 R. C. L., p. 319, to the effect that "A judgment is a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect." *Merchants Bank* v. *Ballou,* 98 Va. 112, 32 S. E. 481, and *Strafford* v. *Sharon,* 61 Vt. 126, 17 Atl. 793. The first case here cited in support of the general rule just quoted had to do with trust deeds on real estate to secure creditors, and in the second case it was held "that, as the proceeding under the Act of 1882 had become in legal effect a judgment *inter partes* while that act remained as to that proceeding in full force, the vested right acquired under that judgment could not constitutoinally be repealed or affected or a new remedy by proceedings *de novo* substituted by the Act of 1886" (Quotation from Syllabus). It is true that a final judgment cannot be disturbed by a curative act of a state legislature if such an act impairs the obligation of a contract (*McGahey* v. *Virginia,* 135 U. S. 662, 685) Any act of the legislature, which is retrospective in its operation, that takes away from some their vested rights, and gives them to others, that changes the nature of obligations, and dispenses with liabilities under which all others would lie in a similar situation, or that is partial in its operation, giving one individual privileges that are not extended to others, contrary to the general law, is not a "law of the land," within the meaning of the Constitution, and is therefore void (*Officer* v. *Young* (1833) 13

Tenn. (5 Yerg.) 320). While certain final judgments are vested rights of property which cannot be taken away by legislative enactments, there are other final judgments which do not carry with them such vested rights. For example, in the case of *Morley* v. *Railway Co.*, 146 U. S. 162, a judgment had been obtained, which, under existing laws, bore interest at a given rate. After its rendition the legislature reduced the rate of interest on judgments, doing so in language which made the act applicable to judgments that had been recovered before the act was passed. It was held that this law neither impaired the obligation of a contract nor deprived judgment creditors of their property without due process of law. There is another line of decisions holding that rights acquired in virtue of existing laws, and claimed to be vested, were not so far vested as to become property within the meaning of the Federal Constitution, and to be for that reason beyond the reach of legislative action. *Evans-Snider-Buel Co., et al.* v. *McFadden et al.*, 105 Fed. 293, affirmed by the Supreme Court of the United States, 185 U. S. 505, and cases cited therein. Hence, the nature and character of the cause of action upon which the final judgment rests determine whether the judgment is such a vested right of property as is protected by the Constitution. Again, the nature and character of a cause of action determine whether or not it is property and is therefore protected by the Supreme law of the land.

We have no criticism to offer against the conclusions reached by this court in *Choate* v. *Trapp*, 224 U. S. 665, and *Wood* v. *Love County*, decided April 26, 1920, U. S. Adv. Ops. 1919-1920, p. 492.

In those cases it was decided that "the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States." This

is true because the "law of Congress" was an essential part of the contracts or patents. The "allotments" could not be taxed during the stated period without impairing the obligations in those contracts. The respondents can get no comfort out of the holdings in these cases.

A clear understanding of the causes of action of the respondents will aid in determining the kind and character of their rights which they are seeking to enforce. The respondents were merchants within the meaning of Section 1614 of Act No. 2657. They were residents of and were authorized to do business in the Philippine Islands. They received the same protection and were entitled to the same rights as any other like residents of that country. They were familiar with the local law governing the percentage tax on merchants' sales. They knew that Section 1614 required them to pay that tax on the gross value in money of the merchandise sold or "consigned abroad by them," and this important fact was taken into consideration at the time the prices of such merchandise were fixed, the amount of the tax being added to the selling price. The Philippine Government called upon them to pay those taxes and they paid them under protest because the taxes were levied and collected, let us say, without authority. They instituted these actions to recover back the money thus paid. The right to commence the suits was given them by statute. They prosecuted their cases to final judgment in the sense heretofore stated, which directed that the money be returned to them, but before the entry of final judgments disposing of the litigation between the parties, Congress created the liability by making legal the levy and collection of the taxes in question. That liability fell upon all of the same class alike and the burden should be borne by all alike. The creation of that liability was in the interest of the general

welfare and was based upon consideration of controlling public necessity. The creation of such a liability based upon those considerations could not and did not impair the obligations of any contract, nor interefere with vested rights, nor result in the taking of private property without due process of law. These actions do not rest upon contractual obligations between private individuals but now upon an obligation of a citizen to his government which affords him protection for his life, liberty, and property. There is a broad and clear distinction between vested rights in real and personal property which arise out of contractual relations between the parties, or by lapse of time, and adverse possession acting upon the title and the *right* to institute and maintain an action to recover back taxes levied and collected without prior authority or even recover such taxes on a final judgment after the passage of the Curative Act. When called upon to resolve questions like those involved in the cases at bar, courts should never close their eyes to the equities of the case, but should permit their judgments to be influenced by the considerations that that which the legislature has done in the way of disturbing rights acquired under existing laws was morally right and in accordance with justice and fair dealing (*Evans-Snider-Buel Co.* v. *McFadden, supra*). The respondents in the instant cases added to the price of their merchandise the amount of the percentage taxes which they paid to the Government. They received valuable consideration in the way of protection for the money which they had paid out in taxes. Many other merchants paid the same kind of taxes but they are not seeking recovery. The rights and obligations of all being the same, no legal or moral grounds can exist for treating them differently. Furthermore, as the taxes imposed in Section 1614 of Act 2657 were *legalized* and *ratified* by the Act

of June 5, 1920, there would be no need of refunding to the respondents the taxes paid under that section as they could be required to return the same amount to the Government as *back-taxes*. The result is that the respondents could acquire no vested rights even under final judgments.

THE JUDGMENTS WERE NOT FINAL ON JUNE 5, 1920.

As we have heretofore stated, the judgments under review having fixed definite amounts to be refunded to the respondents, they were final for purposes of review by certiorari but not final in the sense of terminating the litigation between the parties. No argument other than the plain fact that we are still contesting the claims of the respondents for a refund of the taxes is required to establish this proposition. "No judgment is final which does not terminate the litigation between the parties to the suit" (*St. Clair County* v. *Lovingston*, 85 U. S. 628). Generally speaking, a right of action is property in a qualified sense, but no one can claim a vested right until recovery has been finally adjudged. Before such final adjudication, all is contingent. No one is certain of the result. The right of action of the respondents is not even property in a qualified sense, because they have been made liable for the taxes.

THE CASE OF *UNITED STATES* v. *HEINSZEN & CO., SUPRA*, IS DIRECTLY IN POINT AND SETTLES THE QUESTION OF THE POWER OF CONGRESS TO RATIFY THE COLLECTION OF THE TAXES IN QUESTION.

The case of *United States* v. *Heinszen & Co., supra*, was instituted to recover back the amount of tariff duties

illegally exacted in the Philippine Islands on merchandise entering that country from the United States. That action was pending in the Court of Claims when the Curative Act was passed. It was held that Congress had the power to pass the ratifying act and that that act barred the Company's right to recover. In the instant cases, the Curative Act was passed before final judgments were entered. It seems to us that there is absolutely no grounds for distinction between that case and the three cases at bar.

1. Counsel for respondents, at page 14 of his brief opposing the applications for writs of certiorari, in attempting to distinguish the Heinszen case, says:

> "The military tariff of 1898 was superseded by a Philippine tariff act approved by Congress in the Act of March 8, 1902. The ratification of the military tariff applied, by its terms, to 'the tariff duties—imposed—prior to March 8, 1902.' The duties involved in the Heinszen case were collected after the Treaty of Paris and before March 8, 1902. It was not suggested, and could not have been contended, that the ratification of the military tariff could have validated any collections made ostensibly under its authority after its repeal.
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> "In the present case the judgment covers export duties collected under the pretended authority of Section 1614 of Act 2657 and after August 29, 1916, when so much of said section as authorized export duties was repealed by Section 11 of the Jones Law. If there were involved herein any export duties collected under Section 1614 before the repeal these would be covered by the terms of the ratification of 1920, which certainly can apply to the provisions ratified only so long as they remain in existence."

Or, in other words, counsel contended that where an agent, without precedent authority, has exercised in the name of a principal a power which the principal had the

capacity to bestow and that where the principal had ratified and confirmed the unauthorized acts and expressly directed the agent to abstain from further exercise of such power, the agent continues to do so, the principal was thereby divested of the right and power to ratify and affirm those subsequent acts and thus retroactively give them validity even though no rights of third persons had intervened.

That the mere fact that the agent fails to obey the orders of his principal in this respect does not divest the principal of his right and power to ratify and affirm the unauthorized acts of the agent is so elementary as to need but statement.

If it be conceded that Section 11 of the Act of August 29, 1916, repealed so much of Section 1614 of Act No. 2657 as imposed the percentage tax on the money value of the merchandise sold or consigned abroad, such a repeal could not affect the right or power of Congress to legalize the taxes imposed under that part of the section and to ratify and confirm the subsequent collection of the same. But it is said that in the Heinszen case, *supra*, Congress ratified unauthorized acts only, while in the instant cases an attempt was made to ratify acts which Congress itself had expressly prohibited. This, at most, is a distinction without a difference in so far as the right or power of Congress to act is concerned. If Congress had the power to prohibit the imposition and collection of the taxes, it has the power to withdraw its objection and ratify the collection of the taxes. The acts of officials in levying and collecting taxes without authority are prohibited and may be enjoined at the instance of the taxpayer. The same acts, if carried out in the face of an express prohibition, are likewise prohibited and the taxes may be recovered in a suit at law. In each instance the

acts are *malum prohibitum* and not *malum in se*. At no time would there be an inherent want of power in Congress to act in the premises.

2. Counsel also urged that, while the Heinszen case holds that a Congressional ratification may destroy a mere right of action, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune.

We think the reasoning of the case compels the contrary conclusion and sustains our contention that final judgments in cases such as the three cases at bar are not such vested rights of property that the legislature cannot, by retroactive law, diminish or destroy their value.

In considering the proposition relied upon to the effect that the right to recover the money could not be taken away without violating the Fifth Amendment to the Constitution of the United States the court said:

> "* * *, the argument disregards the fact that when duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify. To hold to the contrary would be to say that whilst the unauthorized act of an officer done on behalf of the United States was subject to ratification by the United States, yet if the officer acted without authority the act when performed annihilated the power to ratify; that is, that the very condition which engendered the power destroyed it.
>
> "But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties

was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416): 'The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced.' * * *.

"* * * Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest." (p. 386, 387).

It being settled beyond question that Congress had the power to authorize the Philippine Government to levy and collect the taxes in question, it necessarily follows that from the moment of collection "a right in Congress to ratify the transaction, if it saw fit to do so, was engendered." The rights of the respondents arising out of the judgments were certainly of no higher order than the right of Congress to ratify the collections. We understand that the respondents do not claim that their alertness in prosecuting their actions divested the right of Congress to ratify but only divested the power of Congress to make that ratification effective as to them. Then the authority to divest that power of Congress is the basis of the right of the respondents to recover or to be liable for the taxes if their judgments had been satisfied before the passage of the ratification act. The Heinszen case is authority for holding that the powers of Congress in matters of taxation cannot be diminished in that man-

ner. No question touching the rights of individuals arising out of contractual relations is here involved.

3. It was further urged that in the Heinszen case the suit was against the United States, while in the instant cases the suits are "against James J. Rafferty and they involve only the liability of the Collector. The distinction is quite clear between an Act of Congress denying the liability of the United States and an act which pretends to relieve one individual from his judgment debt to another."

Does counsel mean that Rafferty is the judgment debtor and that the Philippine Government will not be affected in one way or the other, regardless of the final action of this court? Certainly not. Rafferty is not now collector, and the taxes collected by him from the respondents has long since been turned over to the Philippine Government. These suits are for all intents and purposes actions against the Philippine Government, brought by the respondents with the consent of that government (Section 1721 of Act No. 2657 and Section 1579 of Act No. 2711). The judgments, if not reversed, will have to be satisfied by the Philippine Government and not by the collector out of his personal funds. It is apparent that any further argument upon this proposition is unnecessary.

DID CONGRESS INTEND TO RATIFY THE TAXES IN QUESTION?

Counsel says:

> "It is now proposed to demonstrate conclusively that Congress never intended by this Act of June 5, 1920, to ratify any of the taxes here in dispute, namely, any of those collected between September 30, 1916, and October 1, 1917, but did intend to

ratify those taxes collected under authority of the same section of the Administrative Code of 1916, between July 1, 1916, the date the Code became effective, and August 29, 1916, the date the Jones Law became effective" (page 17 of brief opposing applications for writs of certiorari).

The argument in support of this proposition disregards the plain language of the Act of June 5, 1920, wherein Congress, after legalizing and ratifying the taxes imposed by the Philippine Legislature in Section 1614 of Act No. 2657, declared that the "collection of *all* such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed * * *." Thus, the taxes were legalized and the collection of *all* such taxes was ratified. The word "all" is all-inclusive, and when given its ordinary meaning no taxes levied and collected under that section can be excluded from the operation of the Curative Act. Section 1614 was effective from July 1, 1916, to October 1, 1917, a period of 15 months, during which time large amounts of taxes were collected on the transactions involving sales and consignments of merchandise abroad. Can the ratification of the collection of *all* the taxes mean only those collected between July 1st and August 29th, 1916,—a period of a little less than two months? The mere asking of this question suggests the answer. If any other evidence were needed to show that Congress intended to ratify the collection of *all* the taxes and not just a small part thereof, it may be found in the "Hearing before the Sub-Committee of the House Committee on Appropriations in charge of the deficiency appropriations for the fiscal year 1920 and prior fiscal years, Sixty-sixth Congress, second session, pages 152-162."

PRINCIPLES AND RULES WHICH SHOULD GOVERN COURTS IN EXERCISING THEIR POWER OF ANNULLING ACTS OF THE LAW-MAKING DEPARTMENT OF THE GOVERNMENT.

That this court possesses the power to declare the Curative Act of June 5, 1920, *supra,* unconstitutional, is not denied; and no other power possessed by it is to be more cautiously and considerately exercised. The power of courts to interpret and construe laws, does not carry with it the power to annul them. Courts in the exercise of their power of interpretation are not authorized to disregard the plain language of a law, and by construction to bring it within constitutional restrictions which defeat its purpose. Neither are courts authorized to make, by constructon, the constitutional restrictions applicable to laws which are not within the plain language of that instrument. The uniform doctrine announced in various words of the courts is that a law will not be declared unconstitutional and void, unless it clearly and palpably conflicts with the Constitution; and of this there must be no doubt in the mind of the judge or judges. (See *Fletcher* v. *Peck,* 6 Cranch 37; *Cooper* v. *Telfair,* 4 Dallas 14; *Ogden* v. *Saunders,* 12 Wheaton 270; *The State* v. *Cooper,* 5 Blackford 259; *Wellington et al., Petitioners,* 16 Pick 95).

CONCLUSION.

The petitioner here, defendant below, as Collector of Internal Revenue for the Philippine Government, stands upon the propositions (a) that the taxes in question were not duties on exports but a percentage tax on *transactions* involving sales and consignments of merchandise abroad;

(b) that the collection of those taxes was ratified and confirmed by the Act of June 4, 1918; (c) that the collection of those taxes was ratified and confirmed by the Act of June 5, 1920; and that there is no authority in law for the rendition of judgments against the petitioner for interest and costs. The judgments under review should therefore be reversed in their entirety.

Respectfully submitted,

GRANT T. TRENT,
Lieutenant-Colonel, Judge Advocate.

Of Counsel:
CASSIUS M. DOWELL,
Major, Judge Advocate.

atty for Petitioner